

PETITION FOR WRIT OF HABEAS CORPUS: 28 USC §2254 (Rev. 9/10)
 ADOPTED BY ALL FEDERAL COURTS IN TEXAS

United States Courts
 Southern District of Texas
 FILED

IN THE UNITED STATES DISTRICT COURT

APR 08 2019

FOR THE SOUTHERN DISTRICT OF TEXASDavid J. Bradley
Clerk of CourtVICTORIA DIVISIONPETITION FOR A WRIT OF HABEAS CORPUS BY
A PERSON IN STATE CUSTODYRefugio DeLaCruz

PETITIONER

(Full name of Petitioner)

Stevenson Unit

CURRENT PLACE OF CONFINEMENT

vs.

2068062

PRISONER ID NUMBER

Lori Davis

RESPONDENT

(Name of TDCJ Director, Warden, Jailor, or
authorized person having custody of Petitioner)

CASE NUMBER

(Supplied by the District Court Clerk)

INSTRUCTIONS - READ CAREFULLY

1. The petition must be legibly handwritten or typewritten and signed and dated by the petitioner, under penalty of perjury. Any false statement of an important fact may lead to prosecution for perjury. Answer all questions in the proper space on the form.
2. Additional pages are not allowed except in answer to questions 11 and 20. Do not cite legal authorities. Any additional arguments or facts you want to present must be in a separate memorandum. The petition, including attachments, may not exceed 20 pages.
3. Receipt of the \$5.00 filing fee or a grant of permission to proceed *in forma pauperis* must occur before the court will consider your petition.
4. If you do not have the necessary filing fee, you may ask permission to proceed *in forma pauperis*. To proceed *in forma pauperis*, (1) you must sign the declaration provided with this petition to show that you cannot prepay the fees and costs, and (2) if you are confined in TDCJ-CID, you must send in a certified *In Forma Pauperis* Data Sheet form from the institution in which you are confined. If you are in an institution other than TDCJ-CID, you must send in a certificate completed by an authorized officer at your institution certifying the amount of money you have on deposit at that institution. If you have access or have had access to enough funds to pay the filing fee, then you must pay the filing fee.

5. Only judgments entered by one court may be challenged in a single petition. A separate petition must be filed to challenge a judgment entered by a different state court.
6. Include all of your grounds for relief and all of the facts that support each ground for relief in this petition.
7. Mail the completed petition and one copy to the U. S. District Clerk. The "Venue List" in your unit law library lists all of the federal courts in Texas, their divisions, and the addresses for the clerk's offices. The proper court will be the federal court in the division and district in which you were convicted (for example, a Dallas County conviction is in the Northern District of Texas, Dallas Division) or where you are now in custody (for example, the Huntsville units are in the Southern District of Texas, Houston Division).
8. Failure to notify the court of your change of address could result in the dismissal of your case.

PETITION

What are you challenging? (Check all that apply)

A judgment of conviction or sentence, (Answer Questions 1-4, 5-12 & 20-25)
probation or deferred-adjudication probation.

A parole revocation proceeding. (Answer Questions 1-4, 13-14 & 20-25)

A disciplinary proceeding. (Answer Questions 1-4, 15-19 & 20-25)

Other: _____ (Answer Questions 1-4, 10-11 & 20-25)

All petitioners must answer questions 1-4:

Note: In answering questions 1-4, you must give information about the conviction for the sentence you are presently serving, even if you are challenging a prison disciplinary action. (Note: If you are challenging a prison disciplinary action, do not answer questions 1-4 with information about the disciplinary case. Answer these questions about the conviction for the sentence you are presently serving.) Failure to follow this instruction may result in a delay in processing your case.

1. Name and location of the court (district and county) that entered the judgment of conviction and sentence that you are presently serving or that is under attack: _____

195th Judicial District Court; Dallas County, Texas

2. Date of judgment of conviction: 5/3/15

3. Length of sentence: 25-years-TDCJ

4. Identify the docket numbers (if known) and all crimes of which you were convicted that you wish to challenge in this habeas action: _____

15-75563-N

Judgment of Conviction or Sentence, Probation or Deferred-Adjudication Probation:5. What was your plea? (Check one) Not Guilty Guilty Nolo Contendere6. Kind of trial: (Check one) Jury Judge Only7. Did you testify at trial? Yes No8. Did you appeal the judgment of conviction? Yes No9. If you did appeal, in what appellate court did you file your direct appeal? _____ N/A
Cause Number (if known): _____ N/A

What was the result of your direct appeal (affirmed, modified or reversed)? _____ N/A

What was the date of that decision? _____ N/A

If you filed a petition for discretionary review after the decision of the court of appeals, answer the following:

Grounds raised: _____ N/A

Result: _____ N/A

Date of result: _____ N/A Cause Number (if known): _____ N/A

If you filed a petition for a *writ of certiorari* with the United States Supreme Court, answer the following:

Result: _____ N/A

Date of result: _____ N/A

10. Other than a direct appeal, have you filed any petitions, applications or motions from this judgment in any court, state or federal? This includes any state applications for a writ of habeas corpus that you may have filed. Yes No

11. If your answer to 10 is "Yes," give the following information:

Name of court: 195th Judicial District Court / Dallas County, TEXAS

Nature of proceeding: § 11.07

Cause number (if known): W15-75563-N(A) / WR-87,375-01

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Date (month, day and year) you filed the petition, application or motion as shown by a file-stamped date from the particular court: 2/15/17

Grounds raised: Ineffective Assistance of Counsel, please see Grounds 1-3 in
WR-87, 375-01

Date of final decision: on or about 9/2018

What was the decision? Denied without written order

Name of court that issued the final decision: CCA

As to any second petition, application or motion, give the same information:

Name of court: CCA

Nature of proceeding: Motion For Submission En Banc Per TRAP 76(d) For Fraud Upon Court

Cause number (if known): WR-87, 375-01

Date (month, day and year) you filed the petition, application or motion as shown by a file-stamped date from the particular court: 9/2018

Grounds raised: Fraud Upon The Court

Date of final decision: 9/4/2018

What was the decision? Denied

Name of court that issued the final decision: CCA

If you have filed more than two petitions, applications or motions, please attach an additional sheet of paper and give the same information about each petition, application or motion.

12. Do you have any future sentence to serve after you finish serving the sentence you are attacking in this petition? Yes No

(a) If your answer is "Yes," give the name and location of the court that imposed the sentence to be served in the future: N/A

(b) Give the date and length of the sentence to be served in the future: N/A

(c) Have you filed, or do you intend to file, any petition attacking the judgment for the sentence you must serve in the future? Yes No

Parole Revocation: N/A

13. Date and location of your parole revocation: N/A

14. Have you filed any petitions, applications or motions in any state or federal court challenging your parole revocation? Yes No N/A

If your answer is "Yes," complete Question 11 above regarding your parole revocation.

Disciplinary Proceedings: N/A

15. For your original conviction, was there a finding that you used or exhibited a deadly weapon? Yes No N/A

16. Are you eligible for release on mandatory supervision? Yes No N/A

17. Name and location of the TDCJ Unit where you were found guilty of the disciplinary violation: N/A

Disciplinary case number: N/A

What was the nature of the disciplinary charge against you? N/A

18. Date you were found guilty of the disciplinary violation: N/A

Did you lose previously earned good-time days? Yes No N/A

If your answer is "Yes," provide the exact number of previously earned good-time days that were forfeited by the disciplinary hearing officer as a result of your disciplinary hearing: N/A

Identify all other punishment imposed, including the length of any punishment, if applicable, and any changes in custody status:

N/A

19. Did you appeal the finding of guilty through the prison or TDCJ grievance procedure? Yes No N/A

If your answer to Question 19 is "Yes," answer the following:

Step 1 Result: N/A

Step 2 Result: N/A

Date of Result: N/A

All petitioners must answer the remaining questions:

20. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting them.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

A. **GROUND ONE:** Ineffective Assistance of Counsel was rendered by counsel violating Petitioner's Due Process, 5th, 6th, and 14th Amendment Right to U.S. Const.

Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Please see attached for 'Supporting Facts' - GROUND ONE

B. **GROUND TWO:**

Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

C. **GROUND THREE:** _____

Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

D. **GROUND FOUR:** _____

Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

21. Relief sought in this petition: Petitioner respectfully request that due to his Due Process, 5th, 6th, and 14th Amendments to the U.S. Constitution being violated, he should be entitled to a lesser included offense of up to 10-years TDCJ because he never denied his action, but due to the circumstances and fear for his life, he acted in fear and in self defense as a handicapped man that was severely beaten by two grown men that outsized and outweighed him by at least 200 pounds or more. Thus Ineffective assistance of counsel is clear in the record not to fail to mention the fraud upon the court and now the State's attempt to 'TRANSFER' fraud upon this Honorable Court.

22. Have you previously filed a federal habeas petition attacking the same conviction, parole revocation or disciplinary proceeding that you are attacking in this petition? Yes No
If your answer is "Yes," give the date on which each petition was filed and the federal court in which it was filed. Also state whether the petition was (a) dismissed without prejudice, (b) dismissed with prejudice, or (c) denied.

If you previously filed a federal petition attacking the same conviction and such petition was denied or dismissed with prejudice, did you receive permission from the Fifth Circuit to file a second petition, as required by 28 U.S.C. § 2244(b)(3) and (4)? Yes No N/A

23. Are any of the grounds listed in question 20 above presented for the first time in this petition?
 Yes No

If your answer is "Yes," state briefly what grounds are presented for the first time and give your reasons for not presenting them to any other court, either state or federal.

N/A

24. Do you have any petition or appeal now pending (filed and not yet decided) in any court, either state or federal, for the judgment you are challenging? Yes No

If "Yes," identify each type of proceeding that is pending (i.e., direct appeal, art. 11.07 application, or federal habeas petition), the court in which each proceeding is pending, and the date each proceeding was filed. N/A

25. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

- (a) At preliminary hearing: Brook A. Busbee (Bar #03488000); 3500 Maple Ave, Suite 400; Dallas, TX. 75219
- (b) At arraignment and plea: Same
- (c) At trial: Same
- (d) At sentencing: Same
- (e) On appeal: N/A
- (f) In any post-conviction proceeding: Pro-Se

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

Pro-Se

Timeliness of Petition:

26. If your judgment of conviction, parole revocation or disciplinary proceeding became final over one year ago, you must explain why the one-year statute of limitations contained in 28 U.S.C. § 2244(d) does not bar your petition.¹

As stated in Day v. McDonough, 126 S.Ct. 1675 (2006): At 1687:

We repeatedly asserted that, the passage of time alone could not extinguish the habeas corpus rights of a person subject to unconstitutional incarceration. See Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116, 123, 76 S.Ct.

223. For better or for worse, this doctrine was so well established that the lower courts regularly entertained petitions filed even after extraordinary delays. See, e.g., Hawkins v. Bennett, 423 F.2d 948, 949 (CA 8, 1970(40-yrs)); see also Granberry, 107 S.Ct. 1671.

¹ The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), as contained in 28 U.S.C. § 2244(d), provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

N/A
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for a Writ of Habeas Corpus was placed in the prison mailing system on

April 1, 2019 (month, day, year).

Executed (signed) on April 1, 2019 (date).

R. De la Ovez
Signature of Petitioner (required)

Petitioner's current address: SB No. 2068062

1525 F.M. 766
Cuero, TX. 77954

ATTACHMENT
SUPPORTING FACTS - GROUND ONE

Petitioner's Due Process, 5th, 6th, and 14th Amendment Rights to the U.S. Constitution were violated because defense counsel rendered ineffective assistance of counsel for failing to:

1. introduce to the Court that Petitioner is actually physically handicapped since childhood:
--his left arm is about 25" in length and about 14" in width -vs- his right arm is about 20" in length and about 10" in width severely handicapping him;
2. failed to use the **medical** reports that investigator Joe Vela possessed supporting Petitioner's handicap...Court never saw or aware of such;
3. failed to introduce to the Court the photos from the police and hospital that support the extent of Petitioner's physical assault, bruising, two-black-eyes, swelling of his face from the beating by two full grown men while one held his deformed arm and both hands while the other 'freely' beat him severely; some stitches needed and applied at Parkland Hospital that night.;
4. failed to introduce favorable evidence of the victim's blood that contained illegal drugs and alcohol at time of altercation;
5. failed to raise 'sudden passion'; fear of his life at 5'3" tall or so; and weight of about 140 pounds;
6. defense counsel willfully and intentionally lied, committing fraud upon the convicting court and to the CCA and now attempting to 'TRANSFER' such to this Honorable Court when counsel states in her Affidavit:..."He never said he had a handicap" (Affidavit stamp filed 4/27/18 at page 1), see also Investigator Joe Vela's notes and Petitioner's medical records to support;
7. failed to personally investigate the case or familiarize herself. See also all 3-ineffective assistance raised in Grounds 1-3 in WR-87,375-01.

Petitioner respectfully request a live evidentiary hearing and appointment of counsel so Petitioner may simply remove his shirt in all respects to show the Honorable Court that he is in fact physically handicap and only about 5'3" tall or so, and weight is about 145 now.